COZEN O'CONNOR

Precedential Opinions of Note

Third Circuit Holds Sixth Amendment Right to Counsel Applies Post-Sentencing

Richardson v. Superintendent Coal Township SCI (October 2, 2018), No. 15-4105

http://www2.ca3.uscourts.gov/opinarch/154105p.pdf

Unanimous decision: Bibas (writing), Jordan, and Scirica

Background

Defendant fired his lawyer during his sentencing hearing, but the judge did not ensure that Defendant's waiver of his right to counsel was knowing and voluntary. Defendant's new lawyer did not raise the lack of colloquy in post-sentencing motions. Defendant's post-conviction challenge was denied, and Defendant raised the ineffective assistance of his post-sentencing counsel for the first time on collateral review.

Holding

Defendants in Pennsylvania have a Sixth Amendment right to effective assistance of counsel during post-sentencing motions. A notice of appeal acts as the dividing line between trial and appellate work; counsel for post-sentencing motions, therefore, is considered trial counsel. Consequently, Defendant can raise the deficient performance of his post-sentencing lawyer as an ineffective assistance of trial counsel claim for the first time in a federal *habeas* petition.

Key Quote

"We announce two holdings . . . First, in Pennsylvania state court, the post-sentencing-motions stage is a critical stage at which a defendant is entitled to the effective assistance of counsel. . . . Second, the line dividing trial from appeal falls naturally at the notice of appeal." (Slip. op. at 3.)

Police Request to Remove Hands from Pockets Not Enough for a 'Seizure'

United States v. De Castro (October 3, 2018), No. 17-1901

http://www2.ca3.uscourts.gov/opinarch/171901p.pdf

Unanimous decision: Vanaskie (writing), Chagares, and Fisher

Background

In response to a call about a man brandishing a gun, a police officer approached Defendant and asked him to remove his hands from his pockets. When Defendant complied, the officer saw a pistol protruding from Defendant's pocket. Defendant was arrested, charged, and convicted of being an alien in possession of a firearm. He appealed his conviction, arguing that the gun should have been suppressed as the result of an unconstitutional seizure.

Holding

Police only conduct a seizure when a reasonable person would not feel free to refuse the police request and leave. Defendant was not seized because the officer was alone, did not draw his weapon or touch Defendant, and made a single, polite request without being intimidating.

Key Quote

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Related Practice Areas

- White Collar Defense & Investigations

"[The officer] was the only officer present during the initial encounter, and made a sole, polite, and conversational request for [Defendant] to remove his hands from his pockets, rather than an order for him to show his hands . . . [T]he totality of the circumstances indicates that a reasonable person in [Defendant's] position would have felt free to ignore the officer's request and end the encounter." (Slip. op. at 12-13.)

Revocations of Supervised Release May Not Be Motivated by Rehabilitation

United States v. Schonewolf (October 4, 2018), No. 17-2846

http://www2.ca3.uscourts.gov/opinarch/172846p.pdf

Unanimous decision: Fuentes (writing), Greenaway, Jr., and Rendell

Background

Defendant, a drug addict, was granted a downward variance when she was sentenced for possession with intent to distribute. When she violated her supervised release, the District Court sentenced Defendant to an above-Guidelines term of imprisonment because of her prior variance. The District Court also referred to her addiction and need for rehabilitation. Defendant appealed, arguing that the District Court had improperly imposed an above-Guidelines sentence to force Defendant into rehabilitation.

Holding

Prison terms imposed for violations of supervised release may not solely be motivated by rehabilitation. However, the District Court's references to Defendant's addiction were not improper because it based its sentence on Defendant's prior downward variance.

Key Quote

References to rehabilitation at post-revocation sentencing are only "error where the record suggests that the court may have calculated the length of [a defendant's] sentence to ensure that she receive[s] certain rehabilitative services." (Slip. op. at 20 (internal quotation omitted) (alterations in original).)

Court Orders *En Banc* Rehearing of *De Facto* Life Without Parole Resentencing Case

United States v. Grant (October 4, 2018), No. 16-3820

http://www2.ca3.uscourts.gov/opinarch/163820po.pdf

Prior opinion: http://www2.ca3.uscourts.gov/opinarch/163820p.pdf

Deciding judges: Smith, McKee, Ambro, Chagares, Jordan, Hardiman, Greenaway, Jr., Vanaskie, Krause, Restrepo, and Bibas

Background

At sixteen years old, Defendant was sentenced to life without parole for racketeering and drug distribution offenses that included several killings. After *Miller v. Alabama* (U.S. 2012) held that life without parole is unconstitutional for juveniles, Defendant was resentenced to a term of sixty-five years without parole. Defendant appealed, arguing that his new sentence was *de facto* life without parole because the length of his sentence equaled his life expectancy.

Panel Opinion

The Panel reversed and remanded for resentencing. It held that term-of-years sentences that meet or exceed life expectancy are unconstitutional under *Miller* because they deny a "meaningful opportunity for release." It set forth a framework for sentencing juvenile offenders to implement

Miller that required District Courts to: 1) hold a hearing to determine the defendant's life expectancy, 2) consider the national age of retirement as a sentencing factor, and 3) apply a rebuttable presumption that juvenile offenders should be sentenced below the age of retirement.

Holding

The Government's petition for *en banc* rehearing is granted, and the panel opinion is vacated. Oral argument is scheduled for February 20, 2019.

Third Circuit Overturns Lifetime Computer Ban for Convicted Sex Offender

United States v. Holena (October 10, 2018), No. 17-3537

http://www2.ca3.uscourts.gov/opinarch/173537p.pdf

Unanimous decision: Bibas (writing), Greenaway, Jr., and Restrepo

Background

Defendant used the internet to arrange a sexual encounter with an undercover officer posing as a fourteen-year-old boy. Defendant was sentenced to ten years' imprisonment followed by a lifetime period of supervised release. After twice violating the terms of his supervision relating to internet use, Defendant was forbidden from using or possessing any computer or electronic communication device. Defendant appealed the conviction.

Holding

The Court reversed the lifetime ban on computer use because it was not sufficiently tailored to the danger Defendant poses to the public. Lifelong blanket bans on all computer and electronic communications use are presumptively excessive.

Key Quote

"[Defendant's] supervised release must . . . be tailored to the danger that he poses. [Defendant's] current conditions fail that test . . . They . . . sweep too broadly, preventing him from reading the news or shopping online. And they limit his First Amendment freedoms beyond what is reasonably necessary or appropriate." (Slip. op. at 15.)

Court Endorses Broad View of 'Profit' Motive in Sentencing for Harboring Illegal Alien

United States v. McClure-Potts (November 8, 2018), No. 17-2987

http://www2.ca3.uscourts.gov/opinarch/172987p.pdf

Unanimous decision: Greenaway, Jr. (writing), Ambro, and Chagares

Background

Defendant pled guilty to charges of Social Security fraud and harboring an illegal alien. She housed an undocumented immigrant, fraudulently obtained a Social Security card for him, and used the Social Security number to claim government benefits and tax breaks. She appealed her sentence, arguing that she qualified for an offense-level reduction under the Sentencing Guidelines because she did not commit the offense "for profit."

Holding

A defendant can harbor an undocumented person "for profit" even if she receives payment from someone other than the undocumented person and even if the payment is something other than money. Here, Defendant committed the offense for profit because she received payment in the form of government benefits and tax breaks.

Key Quote

"[T]he tax and assistance benefits that [Defendant] sought out, requested, and received were 'payment' for her harboring [the undocumented person] because the Government, by providing such benefits, was 'discharg[ing] . . . an obligation' that it owed to her." (Slip. op. at 14.)

Court Upholds Most 'Bridgegate' Convictions, Reverses Convictions for Civil Rights Violations

United States v. Baroni & United States v. Kelly (November 27, 2018), Nos. 17-1817, 17-1818

https://www2.ca3.uscourts.gov/opinarch/171817p.pdf

Unanimous decision: Scirica (writing), Ambro, and Siler, Jr. (Sixth Circuit Judge sitting by designation)

Background

Defendants conspired to cause massive traffic delays in Fort Lee, New Jersey, based on a political disagreement with the town's mayor. A jury convicted Defendants of wire fraud, fraudulent misapplication of property, violation of civil rights, and conspiracy. Defendants challenged the sufficiency of the evidence on appeal.

Holding

Sufficient evidence supported convictions for wire fraud and fraudulent misapplication of property; the wages and labor of public employees that Defendants used for their sham traffic study was "property" within the scope of both statutes. By contrast, the evidence did not support Defendants' civil rights convictions — based on restricting the public's right to intrastate travel — because Defendants did not violate a clearly established constitutional right.

Key Quotes

"The Government introduced ample evidence Defendants obtained by false or fraudulent pretenses, at a minimum, public employees' labor. Their time and wages, in which the Port Authority maintains a financial interest, is a form of intangible property." (Slip. op. at 24.)

"Simply put, although four circuits (including our own) have found some form of a constitutional right to intrastate travel, there is hardly a 'robust consensus' that the right exists, let alone clarity as to its contours . . . Based on the Supreme Court's qualified immunity precedent, we hold the District Court erred in concluding *Lutz* [(3d Cir. 1990)], standing alone, provided fair warning that Defendants conduct was illegal . . ." (Slip. op. at 76.)

Court Upholds Stop and Clarifies Sentencing Enhancement for Firearm Possession

United States v. Hester (November 30, 2018), No. 16-3570

https://www2.ca3.uscourts.gov/opinarch/163570p.pdf

Unanimous decision: Restrepo (writing), McKee, and Smith

Background

While police questioned the driver of an idling car, Defendant (a passenger) dropped a gun on the ground. He tried to escape but was arrested; later, he admitted that he had intended to destroy the gun, which had been used in another crime. Defendant unsuccessfully moved to suppress evidence of the gun at trial, and the district judge convicted him at a bench trial of being a felon in possession of a firearm. At sentencing, the district court enhanced Defendant's Sentencing Guidelines range for possessing the gun in connection with another felony, specifically, evidence tampering.

Holding

The Court affirmed the denial of the motion to suppress, holding that the police had reasonable suspicion to stop the car because it was illegally idling outside of a known drug trafficking location, within a high-crime area, late at night. The Court vacated Defendant's sentence, however, holding that a) the Government had failed to show that Defendant actually tampered with evidence, and b) the sentencing judge should not have applied an evidence-tampering enhancement to a sentence for possession of a weapon when the alleged tampering is possession of the weapon.

Key Quote

"[W]e hold that applying the § 2K2.1(b)(6)(B) enhancement to a sentence of an underlying offense of possession of a weapon is improper when the alleged evidence tampering involves merely possessing that same weapon." (Slip. op. at 19.)

Court Orders *En Banc* Rehearing of Prison Litigation Reform Act Case

Brown v. Sage (December 14, 2018), No. 17-1222

http://www2.ca3.uscourts.gov/opinarch/171222po.pdf

Prior opinion: http://www2.ca3.uscourts.gov/opinarch/171222p.pdf

Deciding judges: Smith, McKee, Ambro, Chagares, Jordan, Hardiman, Greenaway, Jr., Vanaskie, Shwartz, Restrepo, Bibas, Porter, and Fuentes

Background

Plaintiff, a federal prisoner, sought leave to proceed *in forma pauperis* in lawsuits against prison employees. The district court denied Plaintiff's motion. Under the Prison Litigation Reform Act's ("PLRA") "three strikes rule," prisoners may not proceed *in forma pauperis* if they previously brought at least three actions that were dismissed. The district court determined that Plaintiff's three prior lawsuits in California federal courts counted as three strikes.

Panel Opinion

The Panel granted Plaintiff leave to proceed *in forma pauperis*. Applying the Third Circuit standard, the Panel decided that one of Plaintiff's California lawsuits did not count as a strike, even though it acknowledged that the suit would count as a third strike under Ninth Circuit law.

Holding

The Defendants' petition for *en banc* rehearing is granted, and the panel opinion is vacated. Oral argument will be scheduled by further order of the Court.

Detailed, Anonymous 911 Call Sufficient for Terry Stop

United States v. McCants (December 18, 2018), No. 17-3103

http://www2.ca3.uscourts.gov/opinarch/173103p.pdf

Unanimous decision: Hardiman (writing), Krause, and Bibas

Background

An anonymous caller reported to 911 that she observed a male "wearing a red hat, with braids" assaulting a female at a particular location. The caller reported that she believed the male had a gun. Within one minute of receiving this dispatch, police officers identified Defendant at the specified location. Defendant had dreadlocks and was wearing a red hat. Officers frisked Defendant and recovered a loaded handgun.

Holding

The anonymous caller's 911 tip provided sufficient indicia of reliability to establish reasonable suspicion of ongoing criminal activity. Therefore, the *Terry* stop of Defendant was lawful.

Key Quote

"In sum, viewing all the circumstances, the anonymous tip bore sufficient indicia of reliability and provided the officers with reasonable suspicion that justified the *Terry* stop. The caller used the 911 system to report an eyewitness account of domestic violence and provided the officers with a detailed description of the suspect and location, both of which were quickly confirmed by the police." (Slip. op. at 13.)

Stop Violated Fourth Amendment After It Was Clear Defendant Was Not the Suspect

United States v. Bey (December 21, 2018), No. 17-2945

http://www2.ca3.uscourts.gov/opinarch/172945p.pdf

Unanimous decision: McKee (writing), Vanaskie, and Restrepo

Background

Officers stopped Defendant, a black male wearing a red jacket, while searching for a suspect fitting that description. Defendant was older, larger, and had a darker complexion than the suspect for whom officers had been searching. Additionally, Defendant had a long beard, while the suspect did not. Despite this, officers continued their search and recovered a gun from Defendant.

Holding

Although their initial stop of Defendant was supported by reasonable suspicion, police violated the Fourth Amendment in continuing that stop after they should have realized that Defendant was not the suspect for whom they were searching.

Key Quote

"Here, the distinction between Robinson and Bey is even more pronounced [than in *United States v. Watson*, 787 F.3d 101 (2d Cir. 2015)] because there is a greater age disparity in addition to the other differences in skin tone, facial hair, height and weight. Because officers recovered the gun after they had a good look at Bey and should have known that he was not Robinson, the district court should have granted the motion to suppress." (Slip. op. at 16.)

Non-Precedential Opinions of Note

Haskins v. Superintendent Greene SCI (November 8, 2018), No. 17-2118

http://www2.ca3.uscourts.gov/opinarch/172118np.pdf

The Third Circuit granted a petition for *habeas corpus* because the prosecution withheld favorable, material evidence from the defense. In its opinion, the Court clarified that evidence is material if there is a reasonable probability that the result of the trial would be different, which "includes not only an acquittal, but also a hung jury or a verdict on a lesser included offense." (Slip. op. at 11.)

United States v. Harder (November 8, 2018), No. 17-2698

http://www2.ca3.uscourts.gov/opinarch/172698np.pdf

The District Court did not err in sentencing Defendant within the applicable Guidelines range after Defendant pled guilty to violations of the Foreign Corrupt Practices Act. Instead, the District Court properly considered, and rejected, Defendant's arguments regarding mitigation of offense severity and sentencing disparities.

United States v. Telles (November 14, 2018), No. 18-1134

http://www2.ca3.uscourts.gov/opinarch/181134np.pdf

Following Defendant's conviction on child pornography charges, the District Court did not commit plain error by prohibiting him from seeking "any employment at businesses where minors frequent, including but not limited to daycare centers, schools, shopping areas and restaurants." The Third Circuit held that the condition of supervised release was properly limited "to the time and extent that is reasonably necessary." (Slip. op. at 11.)

United States v. Yujie Ding (November 19, 2018), No. 16-3768

http://www2.ca3.uscourts.gov/opinarch/163768np.pdf

The Third Circuit affirmed Defendant's conviction and sentencing for wire fraud. Defendant fraudulently secured a research grant under NASA's Small Business Innovation Research Program, which required that grant recipients personally perform the majority of the funded work. Defendant did not perform the majority of the work, and the Court held that Defendant's lies to NASA on this score were material because, without the false representations, he would not have received the grant.

United States v. Mike (November 27, 2018), No. 16-3917

https://www2.ca3.uscourts.gov/opinarch/163917np.pdf

The District Court revoked Defendant's supervised release for violating his release conditions, even though the hearing occurred after the supervision expired. The Third Circuit held that the arrest warrant for the violation "extend[ed] [the judge's] jurisdiction" because it was issued before the supervision finished. (Slip. op. at 6.)

Martin v. GNC Holdings, Inc. (December 11, 2018), No. 17-3303

http://www2.ca3.uscourts.gov/opinarch/173303np.pdf

Because Plaintiffs failed to plead particular facts "giving rise to a strong inference" that Defendants acted with *scienter*, the Third Circuit affirmed the district court's dismissal of Plaintiff's complaint alleging securities fraud.

United States v. Carbajal-Valenzuela (December 12, 2018), No. 17-3652

http://www2.ca3.uscourts.gov/opinarch/173652np.pdf

The Third Circuit remanded for resentencing because it was unclear whether the sentencing judge compared the defendant's conduct to others in the narcotics conspiracy before rejecting a mitigating-role adjustment.

United States v. Todd (December 14, 2018), No. 17-3090

http://www2.ca3.uscourts.gov/opinarch/173090nppan.pdf

Defendant violated her conditions of supervised release, and the district court imposed a prison

term in order to provide "ongoing 24/7 supervision" to fight Defendant's drug addiction. The Third Circuit held that this sentence was improper — because rehabilitation cannot be a "primary basis for imposing a term of incarceration" — but ultimately did **not** vacate the sentence because (a) Defendant failed to object on this ground, and (b) the district court did not commit plain error because the governing law changed only recently (see above, *United States v. Schonewolf*). (Slip. op. at 12.)

United States v. Barry (December 24, 2018), No. 18-1496

https://www2.ca3.uscourts.gov/opinarch/181496np.pdf

The district court did not commit plain error by imposing supervised-release conditions that required Defendant to "not frequent" places where drugs are sold and not "associate" with criminals. The Court noted, however, that circuit courts are split over the constitutionality of these conditions and observed that the split is evidence the conditions "may be unconstitutionally vague." (Slip. op. at 5.)